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IN THE

Supreme Court of the United States

October Term, 1980

WESTVACO CORPORATION,
PACKAGING CORPORATION OF AMERICA, and
GEORGIA-PACIFIC CORPORATION,

Petitioners,

v.

ADAMS EXTRACT COMPANY, et al.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR PETITIONER WESTVACO CORPORATION

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Question Presented

Whether defendants in antitrust cases may assert rights of contribution.

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[1] The 133 respondents are identified in Appendix ("App.") A to the Petition for Certiorari. One hundred six respondents are plaintiffs in certain antitrust actions. The remaining respondents, as well as petitioners, are defendants in one or more of those actions.

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BRIEF FOR PETITIONER WESTVACO CORPORATION

Opinions Below

The opinion of the Court of Appeals is not reported and appears in the Joint Appendix ("J.A.") at 277-78. The opinion of the United States District Court for the Southern District of Texas is reported at 84 F.R.D. 40 and appears at J.A. 259-63.

Jurisdiction

The judgment of the Court of Appeals for the Fifth Circuit was entered on October 30, 1979. The Petition for Certiorari was filed on December 21, 1979, and was granted on June 16, 1980. The jurisdiction of this Court rests upon 28 U.S.C. § 1254(1).

Statement of the Case

Petitioners Westvaco Corporation ("Westvaco"), Packaging Corporation of America ("PCA"), and Georgia-Pacific Corporation ("GP") are three of thirty-seven corrugated container manufacturers named as defendants in one or more of seventy treble-damage antitrust class and non-class actions alleging a nationwide conspiracy to fix the prices of corrugated containers and sheets.[2] *In re Corrugated Container Antitrust Litigation,* M.D.L. 310 (S.D. Tex.) ("M.D.L. 310").

Plaintiffs claim their damages run into many billions of dollars. (J.A. 236) Capitalizing on this exposure, plaintiffs extracted settlements in the class actions from all but two defendants by threatening to hold each non-settling defendant jointly and severally responsible for the damages attributable to all defendants, including those which settled.

Seeking to neutralize plaintiffs' coercive settlement tactics, petitioners filed motions to assert (i) cross-claims for contribution for any damages attributable to settling defendants which petitioners might be required to pay, and (ii) affirmative defenses of "claim reduction" on the theory

[2] Corrugated containers are corrugated boxes used by a wide variety of industries to ship their products.

that plaintiffs had reduced their claims against petitioners by the amount of damages fairly allocable to the defendants with which they settled. (J.A. 74, 128, 223, 231, 238) The object of these motions was to afford petitioners the opportunity to go to trial or to settle on the merits of the case against them by confining their damage exposure to their own acts.

The district court denied leave to assert the cross-claims and the claim reduction defenses. (J.A. 250-51) With respect to the cross-claims, the court entered final judgment. (J.A. 250) The Court of Appeals for the Fifth Circuit affirmed the denial of petitioners' motions to assert cross-claims and dismissed the appeals with respect to the affirmative defenses. (J.A. 277-78)

A. Prior Government Proceedings

The civil treble-damage cases were precipitated by a federal grand jury investigation of the corrugated container industry that began in December 1975 in the Southern District of Texas. On January 25, 1978, two indictments were returned charging fourteen corrugated container manufacturers and twenty-six employees with violation of Section 1 of the Sherman Act, 15 U.S.C. § 1.[3]

The indictments charged defendants with participating in a single conspiracy east of the Rocky Mountains to fix, raise, maintain, and stabilize the prices of corrugated containers and sheets through exchanges of pricing information dating back to 1960. None of the petitioners nor any of their employees was indicted. In fact, petitioner GP was

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[3] Certain defendants were charged with a felony. *United States* v. *International Paper Co., et al.*, Crim. No. H-78-11 (S.D. Tex. 1978). Other defendants were charged with a misdemeanor. *United States* v. *Boise Cascade Corp., et al.*, Crim. No. H-78-12 (S.D. Tex. 1978).

identified by the Government as a victim of the alleged conspiracy.[4]

Certain of the defendants pleaded *nolo contendere*.[5] The trial of the remaining defendants commenced on January 22, 1979, and lasted fifteen weeks. After less than three hours of deliberation, the jury acquitted all defendants.

B. The Civil Corrugated Container Cases

Nearly a year before the Grand Jury completed its investigation, thirty-seven class and three non-class actions were filed against manufacturers of corrugated containers.[6] These suits named as defendants the fourteeen container manufacturers which were subsequently indicted, as well as twenty-three additional companies in the industry including petitioners. Pursuant to 28 U.S.C. § 1407, these and later filed actions were consolidated in the Southern District of Texas and assigned to Judge John V. Singleton, Jr. *In re Corrugated Container Antitrust Litigation*, 441 F. Supp. 921 (J.P.M.L. 1977). Thereafter, in March 1978, plaintiffs in the class actions filed a Unified and Consolidated Complaint ("Complaint"). (J.A. 13) Defendants denied all material allegations of the Complaint.

1. Class Certification and Early Settlements

Plaintiffs filed a joint motion for class action certification on March 20, 1978. Prior to a ruling on the motion, plain-

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[4] Letter from Justice Department to counsel in criminal cases (July 21, 1978).

[5] Twelve corporate and 19 individual defendants pleaded *nolo contendere*. Charges against two individuals were dismissed.

[6] The Chairman of Plaintiffs' Steering Committee in the class actions has explained the genesis of the civil actions: "In 1976, I heard a grand jury was investigating price-fixing in the corrugated box industry. . . . I was the first in Houston to file a case." Rudnitsky & Blyskal, *Getting into Those Deep Pockets*, Forbes 59, 62 (Aug. 4, 1980).

tiffs sought and obtained "ice-breaking" pre-certification settlements with two large defendants, St. Regis Paper Company ("St. Regis") and International Paper Company ("IP"). (J.A. 266-67)

To implement their settlement strategy, plaintiffs assigned to each defendant a number of "points" corresponding to each defendant's percentage share of all defendants' sales of corrugated containers and sheets between 1972 and 1976. (J.A. 43, 151-54) On July 21, 1978, plaintiffs entered into the settlement agreement with St. Regis, an unindicted defendant, for approximately $500,000 per point, or a total of $1.7 million. (J.A. 30, 43) A month later, on August 25, 1978, plaintiffs entered into the agreement with IP, a company that had been charged with a felony and subsequently pleaded *nolo contendere.* IP agreed to pay $1 million per point, or $8.3 million. (J.A. 31, 43)

On September 6, 1978, the district court certified a class of all purchasers of corrugated containers or sheets from defendants during the period between January 1, 1960 and January 25, 1978, estimated to include more than 200,000 members. *In re Corrugated Container Antitrust Litigation,* 80 F.R.D. 244 (S.D. Tex.), *mandamus denied,* No. 78-3684 (5th Cir. 1978). Class certification set the stage for the settlements which followed. On December 13, 1978, plaintiffs announced a settlement agreement with Union Camp Corporation ("Union Camp"), an unindicted company, for $2 million per point, an amount that was twice as much per point as had been paid by IP, an indicted company. (J.A. 158-62)

The Union Camp settlement set in motion a "settlement stampede." The defendants engaged in a footrace with each other to settle before the price went up. Within two weeks, plaintiffs concluded eight new settlements at successively higher amounts ranging up to $4.5 million per point for

indicted companies and up to $2.75 million per point for unindicted companies. (J.A. 162-65)

From December 26, 1978 to January 5, 1979, plaintiffs declared a "moratorium" on settlements. (J.A. 166) Thereafter, settlements were offered at increasingly higher amounts, and during the next two weeks nine more settlements were reached totalling over $210 million. (J.A. 166-71) With each successive settlement during the stampede, plaintiffs demanded and received amounts at a higher rate per point than prior settlements.

Plaintiffs were able to escalate their settlement demands because with joint and several liability, in the absence of contribution or claim reduction, the exposure faced by each non-settling defendant increased with each successive settlement. (J.A. 38) The amount of each settlement was determined by the timing of other settlements rather than by the merits of the case against each settling defendant. For example, The Continental Group, Inc. ("Continental"), which was later acquitted in the criminal case, settled at a rate six and one-half times greater than the rate paid earlier by IP. Certain unindicted defendants, confident of their innocence, were nevertheless compelled by economic pressures to accede to plaintiffs' settlement demands in order to avoid the loss of credit or in order to continue operations.[7]

Thus, before even one deposition had been taken in M.D.L. 310, twenty-four indicted and unindicted defendants collectively had paid over $288 million in only five weeks. Shortly thereafter, two additional defendants settled, bringing the total amount paid to approximately $300 million, representing settlements by over eighty percent of the market. This

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[7] *See, e.g.*, App. A to this Brief; App. F to the Petition for Certiorari; pages 32-33, *infra*.

was said to be the largest settlement in the history of antitrust litigation. (J.A. 271) The majority of the settlements were approved by the district court on December 21, 1979, *In re Corrugated Container Antitrust Litigation,* 1980-1 Trade Cases (CCH) ¶ 63,163 (S.D. Tex. 1979), and others on March 18, 1980.

2. Assertion of Rights of Contribution and Claim Reduction

Westvaco moved on December 7, 1978, for leave to amend its answer to the Complaint to assert cross-claims for contribution against St. Regis and IP, the only defendants which had settled. (J.A. 74) Westvaco also notified all other defendants, none of which had entered into a settlement agreement, of Westvaco's intention to assert contribution cross-claims. (J.A. 74-90) Despite Westvaco's actions, all defendants which later settled failed to protect themselves against Westvaco's contribution claims. None of their settlement agreements provided for the reduction of plaintiffs' claims by the removal of damages attributable to settling defendants' sales from any damages plaintiffs might recover at trial from the non-settling defendants. (*See, e.g.,* J.A. 124)

Westvaco filed an amended motion on March 1, 1979, seeking leave to assert cross-claims against all other settling defendants. (J.A. 128) Westvaco also sought to assert an affirmative defense of "claim reduction" on the theory that, by settling with certain defendants, plaintiffs had thereby reduced their claims against the non-settling defendants by the amount of damages fairly allocable to the settling defendants' activities. (J.A. 138) Similar motions were filed by GP and PCA. (J.A. 223, 231, 238) These motions were all made before any settlements had been approved.

3. Decisions Below

The district court denied petitioners' motions with prejudice on May 30, 1979. (J.A. 250-51) Recognizing the coercive impact of settlements in the absence of contribution, the court nevertheless held that contribution was inappropriate in M.D.L. 310 because it would weaken antitrust deterrence, frustrate settlements, complicate the litigation procedurally, and inhibit joint defense efforts. (J.A. 259-63)

Finding no just reason for delay, the district court directed the entry of final judgment pursuant to Fed. R. Civ. P. 54(b) with respect to the denial of petitioners' cross-claims. (J.A. 250) All three petitioners appealed. (J.A. 272-75) Westvaco and PCA also appealed from the denial of their affirmative defenses. (J.A. 276)

On October 30, 1979, the Court of Appeals for the Fifth Circuit affirmed the district court's denial of petitioners' cross-claims. (J.A. 277-78) The court accepted as controlling its recent decision in *Wilson P. Abraham Construction Corp.* v. *Texas Industries, Inc.*, 604 F.2d 897 (5th Cir. 1979), *petition for cert. filed sub nom. Texas Industries, Inc.* v. *Radcliff Materials, Inc.*, 48 U.S.L.W. 3570 (Jan. 24, 1980) (No. 79-1144) (*"Wilson Abraham"*), in which the majority refused to permit contribution in antitrust cases. (J.A. 278) The court dismissed petitioners' appeals with respect to claim reduction. (J.A. 278)

The Petition for Certiorari was filed on December 21, 1979, and was granted on June 16, 1980.

4. Events Occurring Subsequent to the Filing of the Petition

Petitioners PCA and GP recently settled the class actions. PCA paid $8 million, and GP agreed with two other unin-

dicted defendants to pay an undisclosed portion of a joint settlement package of $3 million.[8]

On June 9, 1980, the trial of the class actions in M.D.L. 310 began against the remaining three defendants, one of which has since settled bringing the total amount paid in settlements to over $320 million. Two defendants, including Westvaco, have gone to trial rather than submit to the unreasonable demands of the class plaintiffs. In the absence of contribution or claim reduction, Westvaco faces potential industry-wide damages under joint and several liability estimated by the class plaintiffs to be billions of dollars notwithstanding the fact that Westvaco's share of the market is approximately three and one-half percent.

Summary of Argument

This Court in the exercise of its federal common-law powers should recognize rights of contribution in antitrust cases to ensure fairness in the apportionment of damages among defendants. Contribution is recognized in various areas of federal law and is especially necessary in antitrust cases because joint and several liability, mandatory treble damages, and class actions present antitrust defendants with enormous damage exposure.

Contribution advances the disgorgement and deterrence objectives of the antitrust laws by ensuring that antitrust violators will be held accountable for their acts. Without contribution, antitrust violators may completely escape liability or obtain preferential "sweetheart" settlements. Contribution also promotes the competitive objectives of the antitrust laws.

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[8] These settlements have not been finally approved by the district court. In addition, all three petitioners remain defendants in one or more non-class actions in M.D.L. 310. The district court denied contribution and claim reduction in these cases as well. (J.A. 250-51; Pretrial Order No. 31, ¶ 3).

Contribution will eliminate settlement coercion in antitrust cases and encourage fair settlements based on the merits of the case. This Court may effectuate contribution rights and at the same time protect settling defendants by recognizing claim reduction, which reduces claims against non-settling defendants by an amount fairly allocable to the acts of settling defendants. Furthermore, settling defendants may provide for claim reduction in their settlement agreements. Either way, claim reduction brings finality to settling defendants and fairness to non-settling defendants without compromising plaintiffs' rights.

Contribution will not complicate antitrust price-fixing cases by adding new substantive issues or presenting procedural manageability problems. Contribution liability will be established according to the same substantive standard as is used to prove antitrust liability. Furthermore, claim reduction by either operation of law or contractual agreement will simplify the proof in antitrust cases.

Recognition of contribution and claim reduction will serve the public interest in encouraging competition and strike a proper balance between (i) the interests of plaintiffs who wish to recover damages for injuries they have suffered, (ii) the interests of defendants who wish to settle on the merits of the case, and (iii) the interests of defendants who wish to assert their innocence at trial.

ARGUMENT

I.

Federal Courts Have the Power to Recognize Contribution in Antitrust Cases

This Court may recognize rights of contribution in areas of federal concern by virtue of its power to fashion federal common-law rules to govern problems which "lie in the penumbra of express statutory mandates." *Textile Workers Union* v. *Lincoln Mills,* 353 U.S. 448, 457 (1957). In that case, the Court concluded that the substantive law to be applied in suits concerning collective-bargaining agreements was "federal law, which the courts must fashion from the policy of our national labor laws." *Id.* at 456. *See also Illinois* v. *City of Milwaukee,* 406 U.S. 91, 103 (1972).[9] As will be demonstrated below, the Court may similarly fashion rules of contribution and claim reduction in antitrust cases in furtherance of antitrust policies.

A. Contribution Falls Within the Common-Law Powers of This Court

Rules governing the availability of contribution are judicial in origin. At common law, a plaintiff could elect to bring suit against fewer than all joint tortfeasors and could choose to execute the full amount of a judgment against any one of multiple defendants. Under English decisions, the judgment-debtor was powerless to recover the appropriate proportional share of damages attributable

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[9] *See Moragne* v. *States Marine Lines, Inc.,* 398 U.S. 375, 392-403 (1970); *Clearfield Trust Co.* v. *United States,* 318 U.S. 363, 367 (1943); *Royal Indem. Co.* v. *United States,* 313 U.S. 289, 296 (1941); *Board of County Comm'rs* v. *United States,* 308 U.S. 343, 349-52 (1939). *See generally* Friendly, *In Praise Of Erie—And Of The New Federal Common Law,* 39 N.Y.U. L. Rev. 383 (1964).

to his joint tortfeasors. *Merryweather* v. *Nixan*, 101 Eng. Rep. 1337 (K.B. 1799). Contribution was generally prohibited by courts in this country in an exercise of their common-law powers. *Union Stock Yards Co.* v. *Chicago, Burlington & Quincy Railroad*, 196 U.S. 217, 224 (1905).

The unfairness of the rule barring contribution led courts to reconsider its desirability. In *Cooper Stevedoring Co.* v. *Fritz Kopke, Inc.*, 417 U.S. 106 (1974), this Court decided to "ameliorat[e] the common-law rule against contribution" in maritime noncollision cases. *Id.* at 111. *See also United States* v. *Reliable Transfer Co.*, 421 U.S. 397, 411 (1975).

Lower federal courts have similarly developed the federal law of contribution in areas of special federal concern. In the absence of statutory provisions, federal common-law contribution rights have been recognized in employment discrimination cases,[10] securities cases,[11] and airline disaster cases.[12] Indeed, the Third Circuit viewed the contribution question as falling within the "responsibility of federal courts to define the body of federal common law which arises from the interstices of federal legislation." *Glus* v. *G.C. Murphy Co.*, 23 Fair Employment Prac. Cases (BNA) 86, 89 (3d Cir. June 27, 1980). The remedies provided by Congress "are not necessarily the only federal remedies available," and "there is a federal common law" in areas of special federal concern. *Illinois* v. *City of Milwaukee, supra*, 406 U.S. at 103.

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[10] *Glus* v. *G.C. Murphy Co.*, 23 Fair Employment Prac. Cases (BNA) 86, 88-90 (3d Cir. June 27, 1980).

[11] *Heizer Corp.* v. *Ross*, 601 F.2d 330, 332-33 (7th Cir. 1979); *Wassel* v. *Eglowsky*, 399 F. Supp. 1330, 1367 (D. Md. 1975), *affirmed*, 542 F.2d 1235 (4th Cir. 1976).

[12] *Kohr* v. *Allegheny Airlines, Inc.*, 504 F.2d 400 (7th Cir. 1974), *cert. denied*, 421 U.S. 978 (1975).

B. Antitrust Is an Area of Special Federal Concern in Which Rights of Contribution Are Cognizable

Antitrust is clearly an area of special federal concern in which rights of contribution are cognizable as a matter of federal common law. The substantive liability of an antitrust defendant is determined by the provisions of the Sherman Act in conjunction with common-law principles, as this Court has repeatedly recognized:

> Congress, however, did not intend the text of the Sherman Act to delineate the full meaning of the statute or its application in concrete situations. The legislative history makes it perfectly clear that it expected the courts to give shape to the statute's broad mandate by drawing on common-law tradition.

National Society of Professional Engineers v. *United States*, 435 U.S. 679, 688 (1978) (footnote omitted). As Judge Learned Hand stated, "Congress has incorporated into the Anti-Trust Acts the changing standards of the common law, and by so doing has delegated to the courts the duty of fixing the standard for each case." *United States* v. *Associated Press*, 52 F. Supp. 362, 370 (S.D.N.Y. 1943), *affirmed*, 326 U.S. 1 (1945).

Accordingly, federal courts have routinely resolved issues ancillary to application of the Sherman and Clayton Acts through exercise of federal common-law powers. It was the federal courts that applied principles of joint and several liability to the antitrust laws by analogizing violators to joint tortfeasors. *City of Atlanta* v. *Chattanooga Foundry & Pipeworks*, 127 F. 23, 26 (6th Cir. 1903), *affirmed*, 203 U.S. 390 (1906). Federal common law determines the effect of a release under the antitrust laws, *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 401 U.S. 321, 343-48 (1971), and the availability of the *in pari delicto*

defense in federal antitrust actions, *Perma Life Mufflers, Inc.* v. *International Parts Corp.*, 392 U.S. 134, 137-40 (1968).

Almost forty years ago, in holding that the principles of estoppel to be applied in an antitrust context were matters of federal common law, this Court stated:

> When a federal statute condemns an act as unlawful, the extent and nature of the legal consequences of the condemnation, though left by the statute to judicial determination, are nevertheless federal questions, the answers to which are to be derived from the statute and the federal policy which it has adopted.

Sola Electric Co. v. *Jefferson Electric Co.*, 317 U.S. 173, 176 (1942).[13]

Moreover, there is no indication in the legislative history of the Sherman Act or the Clayton Act that Congress considered the question of contribution.[14] *Profes-*

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[13] Courts considering contribution in antitrust cases have all concluded that the question should be determined as a matter of federal law. *See, e.g., Wilson P. Abraham Constr. Corp.* v. *Texas Indus., Inc.*, 604 F.2d 897, 900-01 (5th Cir. 1979); *Professional Beauty Supply, Inc.* v. *National Beauty Supply, Inc.*, 594 F.2d 1179, 1182 (8th Cir. 1979).

[14] This case involves the Clayton Act, which expressly provides that persons who violate the Sherman Act shall be subject to civil liability. Petitioners are not asking this Court to imply a private cause of action within the meaning of *Cort* v. *Ash*, 422 U.S. 66 (1975), or its progeny. In such cases, the Court has examined legislative history to determine whether subjecting a party to implied civil liability for violating a statutory standard of conduct is consistent with congressional intent. In contrast, the question in this case is simply whether petitioners have rights of contribution against parties whom Congress has intended to be civilly liable under the antitrust laws.

sional Beauty Supply, Inc. v. *National Beauty Supply, Inc.*, 594 F.2d 1179, 1183 (8th Cir. 1979); *Wilson Abraham, supra,* 604 F.2d at 900. Accordingly, judicial resolution of the issue is appropriate.

II.

Contribution Promotes Fairness by Ensuring Equal Distribution of Justice

The traditional common-law rule against contribution unfairly forces a defendant to absorb the consequences not only of his own acts but also those of his joint tortfeasors. The common-law bar to contribution is especially unjust in antitrust cases when joint and several liability is coupled with massive class action damage exposure, such as in M.D.L. 310.[15] Thus, the issue of contribution has come to the forefront of antitrust litigation.

The obvious inequity of the common-law rule has led federal courts to permit contribution in order to ensure a more equitable apportionment of damages. In *Cooper Stevedoring Co.* v. *Fritz Kopke, Inc.*, 417 U.S. 106 (1974), this Court permitted contribution between joint tortfeasors in maritime noncollision cases. Speaking through Mr. Justice Marshall, the Court adopted a "division of damages" rule on the grounds that contribution was necessary to ensure fairness in the allocation of loss:

> [A] "more equal distribution of justice" can best be achieved by ameliorating the common-law rule against

[15] Under Section 4 of the Clayton Act, 15 U.S.C. § 15, a person injured by reason of a violation of the antitrust laws is entitled to treble damages. It has been held that damages are trebled before amounts recovered in settlement with any defendants are deducted. *See Flintkote Co.* v. *Lysfjord,* 246 F.2d 368, 397-98 (9th Cir.), *cert. denied,* 355 U.S. 835 (1957).

> contribution which permits a plaintiff to force one of two wrongdoers to bear the entire loss, though the other may have been equally or more to blame. See *The Max Morris,* [137 U.S. 1 (1890)], at 14.

417 U.S. at 111.

Only one year later, this Court's concern for fairness compelled abandonment of the division of damages rule, whereby parties paid damages on a pro rata basis, in favor of a more equitable system of damage allocation based upon comparative fault. *United States* v. *Reliable Transfer Co.,* 421 U.S. 397 (1975). Taking notice of the increasing disfavor with which the lower courts had come to regard the outmoded rule, the Court concluded that the divided damages rule was inequitable:

> It is no longer apparent, if it ever was, that this Solomonic division of damages serves to achieve even rough justice. An equal division of damages is a reasonably satisfactory result only where each vessel's fault is approximately equal and each vessel thus assumes a share of the collision damages in proportion to its share of the blame, or where proportionate degrees of fault cannot be measured and determined on a rational basis. The rule produces palpably unfair results in every other case.

Id. at 405 (footnote omitted).

The Court thereupon held that the elimination of potential unfairness required judicial adoption of a rule providing for "just and equitable" allocation of damages. *Id.* at 411. Indeed, by 1979 this Court observed that a tortfeasor "[n]ormally . . . may seek contribution from another concurrent tortfeasor. . . . Contribution remedies the unjust enrichment of the concurrent tortfeasor." *Edmonds* v. *Com-*

pagnie Generale Transatlantique, 443 U.S. 256, 271-72 n.30 (1979).

The principle of "equal distribution of justice," *Cooper Stevedoring, supra,* 417 U.S. at 111, through elimination of unfairness in the allocation of damages has been applied by federal courts in a steady movement toward recognition of contribution rights in numerous areas.

Thus, contribution is broadly permitted under the federal securities laws.[16] The Securities Act of 1933 and the Securities Exchange Act of 1934 expressly provide for contribution in certain circumstances.[17] However, courts have also permitted contribution in securities cases in the absence of specific statutory authorization without regard to whether the underlying cause of action is express or implied. *Compare Wassel* v. *Eglowsky,* 399 F. Supp. 1330, 1367 (D. Md. 1975), *affirmed,* 542 F.2d 1235 (4th Cir. 1976), *with Heizer Corp.* v. *Ross,* 601 F.2d 330, 331-33 (7th Cir. 1979).

In *Heizer,* the Seventh Circuit permitted contribution among defendants in a Rule 10b-5 context in order to permit "a 'more equal distribution of justice,' " *id.* at 332, citing *Cooper Stevedoring.* Contribution ensures that "the burden

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[16] Contribution is available in securities cases without regard to whether the wrongful conduct of the party seeking contribution was intentional or unintentional. In *Globus, Inc.* v. *Law Research Serv., Inc.,* 318 F. Supp. 955 (S.D.N.Y. 1970), *affirmed,* 442 F.2d 1346 (2d Cir.), *cert. denied.* 404 U.S. 941 (1971), the court allowed contribution where the evidence showed fraudulent, wanton and willful misconduct by the party seeking contribution. *Globus, Inc.* v. *Law Research Serv., Inc.,* 287 F. Supp. 188, 192 (S.D.N.Y. 1968). *See Alexander & Baldwin, Inc.* v. *Peat, Marwick, Mitchell & Co.,* 385 F. Supp. 230, 238-39 (S.D.N.Y. 1974).

[17] Section 11(f) of the Securities Act of 1933, 15 U.S.C. § 77k(f); sections 9(e) and 18(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78i(e) and § 78r(b).

of satisfying a judgment or settlement would be equitably borne by the parties responsible for the loss." Fischer, *Contribution in 10b-5 Actions,* 33 Bus. Lawyer 1821, 1827 (1978).[18]

Contribution is also recognized to promote fairness in other areas of the law. In *Glus* v. *G.C. Murphy Co., supra,* the Court of Appeals for the Third Circuit recently affirmed the right of an employer who had settled with a plaintiff class for alleged violations of Title VII of the Civil Rights Act of 1964 to cross-claim for contribution against a union.[19] Judge Higginbotham stated:

> The rule prohibiting contribution has come into disrepute. It is now widely recognized that fundamental fairness demands a sharing of the liability. Without a right of contribution a wrongdoer may escape liability for his actions because of the happenstance of the plaintiff's choice of defendants.

23 Fair Employment Prac. Cases (BNA) at 88.

Similarly, in *Kohr* v. *Allegheny Airlines, Inc.,* 504 F.2d 400 (7th Cir. 1974), *cert. denied,* 421 U.S. 978 (1975), the court permitted contribution in airline disaster cases notwithstanding the absence of any statutory authorization. It rejected "as being outmoded and entirely unsatisfactory,

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[18] *See McLean* v. *Alexander,* 449 F. Supp. 1251, 1266-67 (D. Del. 1978), *reversed on other grounds,* 599 F.2d 1190 (3d Cir. 1979); *Odette* v. *Shearson, Hammill & Co.,* 394 F. Supp. 946, 958 (S.D. N.Y. 1975); *Liggett & Myers Inc.* v. *Bloomfield,* 380 F. Supp. 1044, 1045-46 (S.D.N.Y. 1974); *Altman* v. *Liberty Equities Corp.,* 54 F.R.D. 620, 625 (S.D.N.Y. 1972).

[19] The Third Circuit decided this case after certiorari was granted in *Northwest Airlines, Inc.* v. *Transport Workers Union,* 606 F.2d 1350 (D.C. Cir. 1979), *cert. granted,* 48 U.S.L.W. 3813 (June 16, 1980) (No. 79-1056).

the contention that the federal rule should be one of 'no contribution.' " *Id.* at 405.[20]

Finally, in *Professional Beauty Supply, Inc.* v. *National Beauty Supply, Inc.*, 594 F.2d 1179 (8th Cir. 1979) *("Professional Beauty Supply")*, the first appellate court ever to consider the contribution issue in an antitrust context held unequivocally that fairness requires the application of contribution. In that case, a distributor filed suit against another distributor alleging that the defendant had conspired with a supplier, not named as a defendant, to terminate plaintiff's franchise. After confirming in pretrial discovery that plaintiff's claims were based on the alleged conspiracy between the defendant and the supplier, the defendant filed a third-party complaint for contribution against the supplier. The complaint was dismissed by the district court.

The Eighth Circuit reversed and adopted a rule of contribution for antitrust cases. The court specifically relied (*id.* at 1183) upon *Cooper Stevedoring* and recognized that contribution in treble-damage actions was necessary to ensure fundamental fairness:

> There is an obvious lack of sense and justice in a rule which permits the entire burden of restitution of a loss for which two parties are responsible to be placed upon one alone because of the plaintiff's whim or spite, or his collusion with the other wrongdoer. [citation omitted]
>
> In sum, we adopt for the Eighth Circuit the rule that contribution may be enforced among joint tortfeasors in an antitrust action.

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[20] *See also Gomes* v. *Brodhurst*, 394 F.2d 465 (3d Cir. 1968) (adopting contribution in negligence cases in the Virgin Islands); *Martello* v. *Hawley*, 300 F.2d 721 (D.C. Cir. 1962) (adopting contribution in negligence cases in the District of Columbia).

594 F.2d at 1185-86.[21]

The considerations which compelled recognition of contribution in *Professional Beauty Supply* and other cases are magnified in M.D.L. 310. Petitioners and all other defendants in this case have been forced to choose between acceding to plaintiffs' coercive settlement demands or risking massive industry-wide damages at trial. Thus, contribution is particularly appropriate to ensure fairness in the allocation of damages in M.D.L. 310.

To prohibit contribution in antitrust cases would be inequitable and out of keeping with contemporary standards of fairness. The removal of the anachronistic bar to contribution by this Court, *see Cooper Stevedoring, supra,* 417 U.S. at 110, illustrates that fairness requires recognition of contribution.[22]

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[21] Despite the Fifth Circuit's statement in *Wilson Abraham* that it had considered the arguments set forth in *Professional Beauty Supply,* the court did not discuss fairness considerations. *Wilson Abraham, supra,* 604 F.2d at 900. Of course, the Fifth Circuit panel that decided the Westvaco appeal did not address the issue because it summarily relied upon the *Wilson Abraham* decision. (J.A. 278)

[22] The issue of claim reduction, a concomitant to contribution, arises if contribution in antitrust cases is recognized. When some defendants have settled, contribution rights against settling defendants may be effectuated through claim reduction. *See* pages 35-38, *infra.*

III.

Contribution Promotes Policies Underlying the Antitrust Laws

Contribution promotes policies underlying the antitrust laws because it ensures that antitrust violators will be held accountable for their conduct. In addition, the absence of contribution may discourage or reduce competition.

The treble-damage remedy of the Clayton Act advances three goals. First, it provides a means by which victims of antitrust violations may be compensated for their injuries. Second, it deprives violators of the antitrust laws of the fruits of their illegal conduct ("disgorgement"). Third, it serves to deter future violations. *See Pfizer Inc.* v. *Government of India,* 434 U.S. 308, 314 (1978); *Illinois Brick Co.* v. *Illinois,* 431 U.S. 720, 746 (1977).

Contribution does not affect the right of a plaintiff to be compensated because a plaintiff may collect a judgment entirely from any defendant found to have violated the antitrust laws.[23] Accordingly, courts considering whether contribution should be recognized in antitrust cases have focused upon the other two objectives of the treble-damage remedy.

Absent a rule of contribution, the disgorgement and deterrence objectives of the antitrust laws are needlessly undermined.

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[23] *See Hennessey* v. *National Collegiate Athletic Ass'n,* 564 F.2d 1136, 1147 (5th Cir. 1977); *S.P.A. Ricordi Officine Grafiche* v. *World Art Reproductions Co.,* 22 F.R.D. 312, 316 (S.D.N.Y. 1958).

A. Contribution Deprives Violators of the Fruits of Their Illegal Conduct

In numerous situations, the absence of contribution permits antitrust violators completely to escape liability or to obtain "sweetheart" settlements not commensurate with damages they may have caused.

1. Contribution Prevents Wrongdoers From Completely Escaping Antitrust Liability

Contribution is necessary to ensure that persons who violate the antitrust laws do not completely escape liability. Absent contribution, violators of the antitrust laws are not deprived of the fruits of their illegal conduct.

For example, in *Cackling Acres, Inc.* v. *Olson Farms, Inc.*, 541 F.2d 242 (10th Cir. 1976), *cert. denied*, 429 U.S. 1122 (1977), fourteen egg producers brought an antitrust action solely against Olson Farms, Inc. ("Olson Farms") alleging that five egg distributors, including Olson Farms, had fixed the prices at which they purchased eggs from plaintiffs. Although Olson Farms was responsible for only eleven percent of these purchases, none of the other alleged co-conspirators was sued. At the trial, one of the plaintiffs testified that the other distributors had not been sued in order to avoid disrupting the ongoing business relationships between the plaintiffs and the nondefendant distributors.[24]

The jury returned a verdict for plaintiffs, and judgment was entered against Olson Farms for $2.4 million based on damages attributable to the purchases of all five distributors. The Tenth Circuit affirmed, 541 F.2d 242 (1976),

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[24] *See* Petition for Rehearing at 4, n.2, *Olson Farms, Inc.* v. *Safeway Stores, Inc.*, 1979-2 Trade Cases (CCH) ¶ 62,995 (10th Cir. 1979), *en banc rehearing granted and pending* (Dec. 27, 1979).

cert. denied, 429 U.S. 1122 (1977), and Olson Farms satisfied the judgment in full.

Thereafter, Olson Farms sought contribution from the four other distributors which had been found to have participated in the illegal conduct in *Cackling Acres* and whose purchases had been included in computing damages. The district court dismissed the complaint, *Olson Farms, Inc.* v. *Safeway Stores, Inc.,* 1977-2 Trade Cases (CCH) ¶ 61,698 (D. Utah 1977), and the Tenth Circuit affirmed, 1979-2 Trade Cases (CCH) ¶ 62,995 (10th Cir. 1979), *en banc rehearing granted and pending* (Dec. 27, 1979). The court ignored the fact that companies responsible for nearly ninety percent of plaintiffs' damages completely escaped liability and held that Olson Farms had no right of contribution.[25]

The Court of Appeals for the Eighth Circuit reached a contrary result when confronted with similar facts. Thus, in *Professional Beauty Supply,* 594 F.2d 1179 (8th Cir. 1979), the court, in recognizing contribution for antitrust defendants, stated:

> The fact that one tortfeasor may be held liable for all the damages arising from the antitrust violation necessarily means that other joint tortfeasors may go *"scot free."* This possibility of escaping all liability might cause many to be more willing, rather than less willing, to engage in wrongful activity.

Id. at 1185 (emphasis added). *See* pages 19-20, *supra.* Contribution, therefore, prevents antitrust violators from com-

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[25] Similarly, in *Wilson Abraham, supra,* 604 F.2d at 899, Texas Industries, the sole defendant in a treble-damage action, was denied leave to assert contribution even though it was only one of three companies which had pleaded *nolo contendere* to related price-fixing charges.

pletely escaping liability. *See generally* Leflar, *Contribution And Indemnity Between Tortfeasors,* 81 U. Pa. L. Rev. 130, 136-38 (1932).

2. Contribution Prevents Sweetheart Settlements

The disgorgement objective of the treble-damage remedy may also be frustrated even if all participants in an allegedly illegal scheme are named as defendants. Plaintiffs may enter into sweetheart settlements with selected defendants for reasons unrelated to relative culpability or the merits of plaintiffs' claims against such defendants.[26] These beneficiaries are not forced to disgorge their illegal gains.

In M.D.L. 310, class plaintiffs entered into a sweetheart settlement with IP—a felony-indictee which pleaded *nolo contendere* in the criminal cases—for (i) nearly one-fifth the rate per point of any other felony-indictee which settled during the "stampede," (ii) less than any defendant charged with a misdemeanor in the criminal cases, and (iii) a rate less than all unindicted defendants which settled during the "stampede." [27]

In the absence of contribution, plaintiffs are encouraged to offer sweetheart deals. Such settlements do not affect their potential recovery because all damages attributable to any settling defendant's activities remain in the case for purposes of damage calculation against those defendants who refuse to accede to coercion and elect to go to trial. (J.A. 38)

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[26] In fact, certain plaintiffs in this case have explained that pre-certification sweetheart settlements were sought, in part, "to favorably influence the Court's certification of a class." Joint Brief for Plaintiff-Appellant Container Purchasers at 5, *In re Corrugated Container Antitrust Litigation,* Nos. 80-1018 and 80-1103, *pending* (5th Cir.). Copies of this Brief have been filed with the Clerk of this Court.

[27] A chart setting forth the settlements in M.D.L. 310 through January 1979 is attached as App. B to this Brief.

The *Olson Farms* and *Wilson Abraham* decisions of the Tenth and Fifth Circuits denying contribution permitted certain wrongdoers to retain all the fruits of their unlawful conduct. Similarly in M.D.L. 310, certain of the more culpable defendants were able to settle cheaply on a basis that did not reflect the level of their alleged involvement.[28] The Eighth Circuit in *Professional Beauty Supply,* on the other hand, realized that contribution ensures disgorgement of ill-gotten gains by antitrust violators.[29]

B. Contribution Promotes Deterrence

In *Professional Beauty Supply,* the court recognized that denial of contribution undermines the deterrence policy of the antitrust laws:

> To deny contribution would be to dilute the deterrent effect of the antitrust laws, since a participant in an antitrust violation could escape all responsibility for its wrongdoing.

Id. at 1185. For this reason, contribution is particularly effective in deterring intentional misconduct. *Id.* at 1186. *See Olson Farms, supra,* 1979-2 Trade Cases (CCH) ¶ 62,995, at 79,706-07 (Holloway, J., dissenting); Note, *Contribution in Private Antitrust Actions,* 93 Harv. L. Rev. 1540, 1544 (1980); Recent Developments, *Contribution Among Antitrust Defendants,* 33 Vand. L. Rev. 979, 983 (1980); D. Dobbs, *Law of Remedies* § 10.6, at 704-05 (1973); Corbett, *Apportionment of Damages and Con-*

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[28] The *Manual for Complex Litigation* points out at § 1.46 that "the early-settling defendants may well be those whose liability is clearest."

[29] Similarly, claim reduction furthers the disgorgement objective of the antitrust laws by ensuring that settlements will be based on the merits and will fairly reflect the illegal gains, if any, located in the coffers of each settling defendant. Thus, claim reduction discourages sweetheart settlements.

tribution Among Coconspirators in Antitrust Treble Damage Actions, 31 Fordham L. Rev. 111, 137 (1962).[30]

The Fifth Circuit in *Wilson Abraham* rejected contribution because it believed that the possibility of massive treble-damage awards without contribution would be more likely to deter violations than increasing the certainty that all violators will be forced to bear the consequences of their conduct. In refusing to recognize contribution, the court stated:

> The chance that a participant may be faced with a full judgment is more likely to discourage anticompetitive conduct than would ensuring that each participant pays only some fair share.

604 F.2d at 901. As demonstrated below, this limited view of deterrence is predicated upon an insufficient and erroneous analysis of corporate behavior.

First, the Fifth Circuit assumed without empirical foundation that when there is no contribution, greater deterrence results from the threat of more severe but less certain penalties. The reverse assumption is equally if not more plausible.[31] Contribution leads to greater deterrence by increasing the certainty that all parties will be held responsible for their illegal conduct. *See Professional*

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[30] *See also Heizer Corp.* v. *Ross,* 601 F.2d 330, 334 (7th Cir. 1979) and cases cited in note 16, *supra; International Union of Elec., Radio & Mach. Workers* v. *Westinghouse Elec. Corp.,* 73 F.R.D. 57, 59 (W.D.N.Y. 1976); *Slotkin* v. *Brookdale Hosp. Center,* 377 F. Supp. 275, 279-80 (S.D.N.Y. 1974); *Judson* v. *Peoples Bank & Trust Co.,* 17 N.J. 67, 87-91, 110 A.2d 24, 34-36 (1954); *Maryland Lumber Co.* v. *White,* 205 Md. 180, 198-200, 107 A.2d 73, 80-81 (1954); *Taylor* v. *Kinston Free Press Co.,* 237 N.C. 551, 553, 74 S.E.2d 528, 530 (1953).

[31] *See Panel Discussion: Private Actions—The Purposes Sought And The Results Achieved,* 43 Antitrust L. J. 73, 104 (1974). *See also Contribution In Private Antitrust Actions, supra,* 93 Harv. L. Rev. at 1544-45.

Beauty Supply, supra, 594 F.2d at 1185; Corbett, *Apportionment of Damages, supra,* 31 Fordham L. Rev. at 137.

Second, even if the Fifth Circuit correctly characterized the risk factors that top level "business managers" consider when contemplating unlawful behavior, 604 F.2d at 901 n.8, the court assumed that those persons are the same individuals who engage in unlawful conduct. Middle level managers, however, are often the persons whose activities lead to alleged antitrust violations, and their behavior is not affected by the magnitude of their employers' potential penalties but rather by the possibility of detection and its impact upon their careers.[32] Contribution clearly deters such persons more than the absence of contribution:

> The deterrent effect of a determination that those managers violated the antitrust laws would not be tied to the magnitude of liability because firm sanctions against such managers depend primarily upon the fact of violation. Under such circumstances, allowing contribution would best deter antitrust violations, for it would increase the probability that the company will be held liable for those violations and hence increases the frequency of company sanctions against overzealous employees.

Contribution In Private Antitrust Actions, supra, 93 Harv. L. Rev. at 1546 (footnotes omitted).

Accordingly, the Fifth Circuit's rationale for denying contribution is unpersuasive as a practical and theoretical matter. Deterrence is, in fact, promoted by contribution.

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[32] Major corporations have adopted antitrust compliance programs in which employees are instructed in antitrust principles and directed to conform their conduct to the law. Employees who violate antitrust compliance programs are subject to discipline. *See generally* J. Garrett, *Antitrust Compliance* (1978); *Panel Discussion: Varied Approaches to Antitrust Compliance,* 48 Antitrust L.J. 53 (1980).

C. Competition May Be Discouraged or Reduced in the Absence of Contribution

A fundamental goal of the antitrust laws is to encourage and protect competition. *Northern Pacific Railway Co.* v. *United States,* 356 U.S. 1, 4-5 (1958). In the absence of contribution, (i) procompetitive conduct in certain instances may be discouraged, and (ii) small companies may be competitively weakened.

1. Procompetitive Conduct May Be Discouraged Without Contribution

This Court has observed that the Sherman Act has a "generality and adaptability comparable to that found to be desirable in constitutional provisions." *Sugar Institute, Inc.* v. *United States,* 297 U.S. 553, 600 (1936). This ensures that new forms of anticompetitive behavior will fall within the prohibition of the statute, but it also renders certainty in business planning extremely difficult.[33]

In *United States* v. *United States Gypsum Co.,* 438 U.S. 422 (1978), the Court noted this paradox and observed that "the behavior proscribed by the Act is often difficult to distinguish from the gray zone of socially acceptable and economically justifiable business conduct." *Id.* at 440-41. The Court specifically noted that exchanges of price information among competitors demonstrated these uncertainties because such exchanges might be procompetitive or anticompetitive depending upon the nature of the exchange and the market structure of the industry involved.

Prohibition of contribution magnifies the "distinct possibility of overdeterrence" against which this Court cautioned in *Gypsum. Id. See* Jacobson, *Contribution Among Anti-*

[33] Upon proof of a violation of the antitrust laws and damages, a plaintiff may recover even if the liability question is a close one or new rules of law are established. *Simpson* v. *Union Oil Co.,* 396 U.S. 13 (1969).

trust Defendants: A Necessary Solution To A Recurring Problem, 32 U. Fla. L. Rev.__(1980) (to be published). Procompetitive conduct "might be shunned by businessmen who chose to be excessively cautious." *Gypsum, supra,* 438 U.S. at 441. *See generally* Austin, *Negative Effects of Treble Damage Actions: Reflections on the New Antitrust Strategy,* 1978 Duke L.J. 1353, 1366-72. In the absence of contribution, competitors may refrain from engaging in procompetitive conduct because of the risk of being held liable not only for their own acts but also for the acts of others.[34]

2. Small Companies May Be Competitively Weakened Without Contribution

In the absence of contribution, settlement coercion imposes an intolerable burden on small companies. These firms cannot risk the possibility of a verdict placing the damages attributable to an entire industry on their shoulders. As a result, they are utterly vulnerable to plaintiffs' escalating settlement demands. *See* Janofsky, *The "Big Case": A "Big Burden" on Our Courts,* 66 A.B.A.J. 848, 849 (1980).

Small companies named as defendants in antitrust class actions have two options: comply with plaintiffs' demands or risk going out of business. The first option itself may competitively weaken a small company, as is illustrated in M.D.L. 310 by the settlements of U.S. Corrugated Fibre-Box Company ("U.S. Corrugated") and Green Bay Packaging Co., Inc. ("Green Bay").[35] And the second option

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[34] There is no indication in the opinions in *Wilson Abraham* or this case that the Fifth Circuit realized the possibility that certain procompetitive conduct could be chilled in the absence of contribution.

[35] *See* App. F to the Petition for Certiorari; App. A to this Brief. *See also* pages 5-6, *supra;* pages 32-33, *infra.*

is counterproductive and increasingly subject to criticism. As the Third Circuit recently cautioned:

> [C]ourts have been wary of permitting "overkill" recoveries, whose punitive impact may unduly cripple a defendant and lead to an overall deleterious effect upon competition.

Mid-West Paper Products Co. v. *Continental Group, Inc.*, 596 F.2d 573, 587 (3d Cir. 1979) (footnote omitted). *See also Kline* v. *Coldwell, Banker & Co.*, 508 F.2d 226, 234 (9th Cir. 1974), *cert. denied*, 421 U.S. 963 (1975).[36]

A rule prohibiting contribution therefore offers the worst of both worlds. It not only interferes with the disgorgement and deterrence objectives of the antitrust laws, but also risks discouraging procompetitive conduct and weakening, if not destroying, small companies.

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[36] *See Jeffrey* v. *Southwestern Bell*, 518 F.2d 1129, 1131 (5th Cir. 1975); *Calderone Enterprises Corp.* v. *United Artists Theatre Circuit, Inc.*, 454 F.2d 1292, 1295 (2d Cir. 1971), *cert. denied*, 406 U.S. 930 (1972); *Reading Industries, Inc.* v. *Kennecott Copper Corp.*, 477 F. Supp. 1150, 1159-60 (S.D.N.Y. 1979); *Shapiro* v. *General Motors Corp.*, 472 F. Supp. 636, 659 (D. Md. 1979).

IV.

Contribution in Antitrust Cases Will Eliminate Settlement Coercion and Promote Fair and Final Settlements

Recognition of contribution and the concomitant right of claim reduction will eliminate settlement coercion in large antitrust class actions and will also promote fair and final settlements.

A. Contribution Will Eliminate Settlement Coercion

Courts have expressed growing concern that the aggregation of damage claims in class actions may coerce settlements without regard to the merits of plaintiffs' claims. Thus, in *Coopers & Lybrand* v. *Livesay*, 437 U.S. 463 (1978), this Court observed:

> Certification of a large class may so increase the defendant's potential damages liability and litigation costs that he may find it economically prudent to settle and to abandon a meritorious defense.

Id. at 476. *See also Reiter* v. *Sonotone Corp.*, 442 U.S. 330, 345-46 (1979) (Rehnquist, J., concurring).

The aggregation of claims by hundreds of thousands of class members in M.D.L. 310 confronted each petitioner and all defendants with staggering damage exposure. In the absence of contribution and claim reduction, each successive settlement increased the pressure on non-settling defendants to settle irrespective of the merits of their defenses. As each defendant settled, the exposure of the remaining non-settling defendants increased because the sales of the settling defendants remained in the case for purposes of damage calculation. (J.A. 38)

The unfairness of this coercion, which affected large and small businesses alike, is apparent from the following examples:

Continental, one of the larger defendants, pleaded not guilty in the criminal case and was acquitted by a jury. Prior to the criminal trial, but after sixteen other defendants had settled, Continental settled for $27.4 million or $6.5 million per point, the highest rate of any settling defendant and six and one-half times greater than IP. (App. B to this Brief.)

Container Corporation of America was charged with a misdemeanor. Despite a market share virtually identical to IP, it paid $34.2 million or more than four times the amount paid by felony-indictee IP. (*Id.*)

U.S. Corrugated was not indicted.[37] Although it had the smallest market share of all defendants, U.S. Corrugated settled at a rate eight times higher than St. Regis and four times higher than IP. In dollar terms this was equivalent to U.S. Corrugated's after-tax profits for three and one-half years. As a result, the company was forced to close one of it plants, laying off 200 employees. (App. F to the Petition for Certiorari.)

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[37] Twenty-three companies were named as defendants in M.D.L. 310 even though they were not indicted in the criminal cases. It is not uncommon for treble-damage actions to be brought against virtually all members of an industry when a grand jury investigation becomes a matter of public knowledge or after many companies have responded to subpoenas *duces tecum*. *See, e.g., In re Fine Paper Antitrust Litigation*, 446 F. Supp. 759 (J.P.M.L. 1978); *In re Government Auto Fleet Sales Antitrust Litigation*, 328 F. Supp. 218 (J.P.M.L. 1971). Until a grand jury investigation is completed, plaintiffs have no basis for knowing which companies may be culpable. But once a company is named as a defendant in a civil case, whether fairly or unfairly, its only practical options are settlement or trial.

Green Bay, another one of the small defendants in M.D.L. 310, had resolved to vindicate its innocence at trial because it believed it had done nothing wrong. After other defendants settled, however, Green Bay, a family-owned business, was faced with the loss of its line of credit unless it resolved its contingent liability. To remain viable, Green Bay had no choice but to accept plaintiffs' demand for $3.75 million per point. Plaintiffs threatened to increase this amount if settlement were delayed. (App. A to this Brief at A-3.) As George Kress, the founder and president of Green Bay, stated:

> The effect of this extortive settlement practice upon a small, family-owned and managed business is catastrophic. We were threatened with the loss of over fifty years of effort, and coerced into paying an exorbitant settlement rather than being afforded the privilege of ultimately proving our corporate innocence.

(*Id.* at A-5.) *See* Janofsky, *supra,* 66 A.B.A.J. at 849.

Petitioner GP was identified in the criminal cases as a victim of the alleged conspiracy. Nevertheless, GP, together with two other unindicted defendants, settled for $3 million.

The district court, in recognizing the "inherent" coerciveness which led to the settlements in M.D.L. 310, stated:

> It appears that Westvaco seeks contribution primarily to avoid the coercive impact to it, as a late-settling or non-settling defendant, of the possibility of enormous damages being assessed against it. That this possibility is inherently coercive is undisputable.

(J.A. 260) Thus, Judge Singleton acknowledged what has become commonplace in antitrust class actions.[38]

The settlement scenario in M.D.L. 310 illustrates plaintiffs' unencumbered ability to manipulate one defendant at the expense of another and, in the process, to shift disproportionate exposure to those who refuse to bow to this coercion. (J.A. 150-71) Recognition of rights of contribution and claim reduction will end this undisputed reign of coercion in massive antitrust actions.[39] Contribution will permit each defendant to exercise its right to go to trial or to negotiate a fair settlement based on the merits of the case.

B. Contribution Will Promote Fair Settlements

This Court has recognized that fairness in judicial allocation of damages will generate fairness in private negotiation of settlements. In *United States* v. *Reliable Transfer Co.*, 421 U.S. 397 (1975), the Court endorsed equitable apportionment of damages and noted that fair settlements would thereby be encouraged:

> Experience with comparative negligence in the personal injury area teaches that a rule of fairness in court will produce fair out-of-court settlements.

Id. at 408 (footnote omitted).

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[38] *See Kline* v. *Coldwell, Banker & Co.*, 508 F.2d 226, 234-35 (9th Cir. 1974), *cert. denied*, 421 U.S. 963 (1975); *Hooley* v. *Red Carpet Corp. of America*, 1975 Trade Cases (CCH) ¶ 60,285, at 66,112 (D. Ore. 1975), *appeal dismissed*, 549 F.2d 643 (9th Cir. 1977); *Arth Main St. Drugs* v. *Beer Distribs., Inc.*, 26 F.R. Serv. 2d 87 (N.D. Ind. 1978). *See generally* Rowe, *On Fostering Fights*, N.Y. Times, Aug. 6, 1980, at A-21.

[39] *See* Handler, *The Shift from Substantive to Procedural Innovations in Antitrust Suits*, 71 Colum. L. Rev. 1, 9 (1971).

The fact that plaintiffs are able to coerce defendants into settlement stampedes is no justification for prohibiting contribution. This Court has rejected this argument:

> For, at bottom, it asks us to continue the operation of an archaic rule because its facile application out of court yields quick, though inequitable, settlements, and relieves the courts of some litigation. *Congestion in the courts cannot justify a legal rule that produces unjust results in litigation simply to encourage speedy out-of-court accommodations.*

Id. (emphasis added).[40]

Under contribution and claim reduction, settlements will not be discouraged. Plaintiffs and defendants will have incentives to settle antitrust cases for amounts based on their respective assessments of the likelihood of success at trial. The certainty of outcome provided by settlement will remain attractive.

C. Final Settlements Can Be Achieved When Contribution Is Coupled With Claim Reduction

1. Claim Reduction Is Fair to All Parties

This Court can direct that contribution rights be effectuated through claim reduction in cases, such as M.D.L. 310, in which some defendants have settled. This would protect non-settling defendants' rights of contribution and settling defendants' interests in finality by treating settlements as providing plaintiffs with full satisfaction for any damages attributable to settling defendants' acts.

In *Gomes* v. *Brodhurst,* 394 F.2d 465 (3d Cir. 1968), the Third Circuit held that a settlement by one tortfeasor

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[40] *See Leger* v. *Drilling Well Control, Inc.,* 592 F.2d 1246, 1249 (5th Cir. 1979); *Gomes* v. *Brodhurst,* 394 F.2d 465, 467 (3d Cir. 1968).

provides a plaintiff with full satisfaction for any damages attributable to the settling defendant's acts. The court recognized that such a result would best serve "the encouragement of voluntary settlements, the equitable distribution of liability among joint tortfeasors, and the elimination or minimization of collusion." *Id.* at 467.[41]

Claim reduction not only serves the interests of all defendants, but is also fair to plaintiffs. Plaintiffs' claims are in effect reduced by the amount of damages fairly allocable to settling defendants on the theory that plaintiffs have "sold" that portion of their claims in exchange for the settlements. As Mr. Justice Brennan (then a Justice of the Supreme Court of New Jersey) recognized:

> "The problem is to blend the themes of compromise and contribution, maintaining the essential integrity of each as far as possible," . . . Collusive settlements are wholly ineffective when a credit of the settler's *pro rata* share is the required result of any settlement, and this helps attain one of the objectives of the contribution statute. And, thereby the settling tortfeasor is assured of the finality of his settlement, and impairment of the public policy favoring compromise is avoided. The injured party should not be discouraged from settlement by such a rule. He cannot complain of unfairness, since ". . . the reduction would be a direct result of his own act in accepting less than [the settler's *pro rata* share of] the total recoverable damages in settlement with the compromising wrongdoer."

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[41] *See Luke* v. *Signal Oil & Gas Co.*, 523 F.2d 1190, 1191 (5th Cir. 1975); *Doyle* v. *United States*, 441 F. Supp. 701, 710, n.5 (D.S.C. 1977); *Palestine Contractors, Inc.* v. *Perkins*, 386 S.W.2d 764, 767 (Tex. 1964).

Judson v. *Peoples Bank & Trust Co.*, 17 N.J. 67, 93, 110 A.2d 24, 36-37 (1954), *quoting McKenna* v. *Austin*, 134 F.2d 659 (D.C. Cir. 1943).[42]

Thus, in *Little Rock School District* v. *Borden, Inc.*, 1980-1 Trade Cases (CCH) ¶ 63,059 (E.D. Ark. 1979), a district court in the Eighth Circuit applied *Professional Beauty Supply* to a settlement in a price-fixing case and held that contribution required claim reduction once a settlement had been reached between plaintiffs and one of the defendants:

> A settling defendant may be liable to co-defendants for contribution unless they are released from any liability for the settling defendant's "overcharges." Therefore, if the settlement is to be approved, it must release non-settling defendants from liability for the settling defendant's actions and also release the settling defendant from any liability for contribution, in keeping with the directive in *Professional Beauty* that "the court should be able to fashion a rule of contribution which will protect the rights of the settling defendants."

¶ 63,059, at 77,252.[43] Commentators have favored effectuation of contribution rights in such a manner when there have been settlements. *Compare Contribution In Private*

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[42] *See Kassman* v. *American Univ.*, 546 F.2d 1029, 1033-34 (D.C. Cir. 1976); *Rose* v. *Associated Anesthesiologists*, 501 F.2d 806, 807-10 (D.C. Cir. 1974); *Snowden* v. *D.C. Transit Sys., Inc.*, 454 F.2d 1047, 1048-49 (D.C. Cir. 1971); *Brightheart* v. *McKay*, 420 F.2d 242, 243-44 (D.C. Cir. 1969); *Martello* v. *Hawley*, 300 F.2d 721, 724 (D.C. Cir. 1962).

[43] The court subsequently held that although claim reduction "may well be a superior method" for implementing contribution against a settling defendant, plaintiffs' agreement to indemnify the settling defendant against any contribution claims was also consistent with *Professional Beauty Supply*. *Little Rock School Dist.* v. *Borden, Inc.*, Nos. LR-76-C-41, LR-C-77-126, and LR-C-77-108 (E.D. Ark. Aug. 4, 1980).

Antitrust Actions, supra, 93 Harv. L. Rev. at 1560, *and* Jacobson, *Contribution Among Antitrust Defendants: A Necessary Solution To A Recurring Problem, supra,* 32 U. Fla. L. Rev.___, *with* Easterbrook, Landes & Posner, *Contribution Among Antitrust Defendants: A Legal and Economic Analysis,* 23 J.L. & Econ.___(1980) (to be published).[44]

Claim reduction in M.D.L. 310 is fair to all parties. The record-breaking settlements were found by the district court to be fair and adequate to all class members. (J.A. 264-65, 271) Accordingly, claim reduction would (i) effectuate petitioners' rights of contribution, (ii) be fair to the class which chose to settle its claims, and (iii) bring "peace" to the settling defendants.

2. Settling Defendants Chose to Risk Contribution Liability

Even if this Court does not reach the question of claim reduction, petitioner Westvaco is nevertheless entitled to assert rights of contribution against the settling defendants.

In M.D.L. 310, Westvaco asserted cross-claims for contribution before all but two settlement agreements were even negotiated. (J.A. 74-76) Indeed, all parties were on notice of all petitioners' cross-claims for contribution and affirmative defenses of claim reduction before any settlements were approved.

The settling defendants sought to obtain protection in their various settlement agreements against contribution liability by having plaintiffs agree to exclude the settling defendants' sales from any damages thereafter sought from

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[44] A district court in the Fourth Circuit recently permitted a group of antitrust defendants to amend their pleadings to assert an affirmative defense of claim reduction in a price-fixing case. *Duplan Corp.* v. *Deering Milliken, Inc.*, No. 71-306 (D.S.C. Aug. 4, 1980).

non-settling defendants.[45] (J.A. 36, 159-60) When plaintiffs refused, each settling defendant nevertheless elected to settle in full recognition of the risk that non-settling defendants would seek contribution.[46]

All parties were aware that contribution claims would be asserted. Plaintiffs have stated:

> Upon the advice of competent counsel, settling defendants freely and knowledgeably negotiated the amounts and the terms of the settlements. They were at all times aware of the contingencies which were compromised by the settlements, including the possibility that they might one day be held liable for contribution.

Brief of Class Plaintiffs-Appellees at 68, *In re Corrugated Container Antitrust Litigation,* Nos. 80-1018 and 80-1103, *pending* (5th Cir.).[47]

All defendants knew of the cases pending in the Fifth (*Wilson Abraham*), Eighth (*Professional Beauty Supply*), and Tenth (*Olson Farms*) Circuits involving rights of con-

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[45] If a settling defendant's sales are removed from the basis of damages sought against non-settling defendants, rights of contribution are satisfied. Settlements providing such protection occurred in *In re Cement & Concrete Antitrust Litigation,* M.D.L. 296 (D. Ariz.), reported at 932 Antitrust & Trade Reg. Rep. (BNA) D-2-3 (Sept. 27, 1979) and 927 Antitrust & Trade Reg. Rep. (BNA) A-1 (Aug. 16, 1979) and in *In re Plywood Antitrust Litigation,* M.D.L. 159 (E.D. La.), reported at 859 Antitrust & Trade Reg. Rep. (BNA) A-18 (April 13, 1978).

[46] Of course, it is axiomatic that if there is a right of contribution, a non-settling defendant's right cannot be cut off by settlement agreements to which he is not a party. *See Leger* v. *Drilling Well Control, Inc.,* 592 F.2d 1246, 1249 (5th Cir. 1979); *Altman* v. *Liberty Equities Corp.,* 54 F.R.D. 620, 624-25 (S.D.N.Y. 1972); *Palestine Contractors, Inc.* v. *Perkins,* 386 S.W.2d 764, 767 (Tex. 1964).

[47] Copies of this Brief have been filed with the Clerk of this Court.

tribution in antitrust cases. (J.A. 113) Two settling defendants have stated:

> All parties were fully aware of the general trend among courts in favor of proportionate liability among defendants. They were aware as well that the issue of proportionate liability was already under consideration by this Court in *Wilson P. Abraham Constr. Co.* v. *Texas Industries, Inc.*, No. 78-1788, and *Iowa Beef Processors, Inc.* v. *Spencer Foods, Inc.*, No. 78-3346. Moreover, the issue was explicitly injected into the center ring of the present case by defendant Westvaco early in the settlement process.
>
> Finally, and most importantly, as the class plaintiffs pointed out below, the parties were "well aware" of the cases pending with respect to the issue of proportionate liability, and those settling—both plaintiffs and defendants—assumed "the risks that the rule against [proportionate liability] might change . . . ."

Brief for Appellees Weyerhaeuser Company and Willamette Industries, Inc. at 11, *In re Corrugated Container Antitrust Litigation*, No. 79-2439 (5th Cir. 1979).[48]

Finally, in approving the settlements, the district court specifically found:

> The settlements were negotiated by very able and experienced lawyers, presumably familiar with the state of the law on contribution and state claims, and it is virtually inconceivable that these two contingencies were not factored in by them.

In re Corrugated Container Antitrust Litigation, 1980-1 Trade Cases (CCH) ¶ 63,163, at 77,790 (S.D. Tex. 1979).

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[48] This Brief was filed in connection with petitioners' appeals to the Fifth Circuit of the denials of their cross-claims and claim reduction defenses. Copies of this Brief have been filed with the Clerk of this Court.

Notwithstanding the record, certain settling defendants have opposed petitioners' rights of contribution by arguing that they settled in good faith. Having chosen to settle without protection against contribution, their conscious election provides no basis in law or in equity for denying petitioners their rights of contribution.

V.

Contribution Will Not Complicate Antitrust Cases

Certain lower courts have expressed concern that contribution will complicate antitrust cases. *Wilson Abraham, supra,* 604 F.2d at 905-06. As this case demonstrates, such fears are unfounded. Recognition of contribution in antitrust price-fixing cases will neither add substantive issues nor present manageability problems.

A. Contribution Will Not Add New Issues to Antitrust Price-Fixing Cases

Plaintiffs in a price-fixing case must prove violation, impact, and damages. *Story Parchment Co.* v. *Paterson Parchment Paper Co.,* 282 U.S. 555, 560 (1931). In order to recover damages in price-fixing cases such as M.D.L. 310, plaintiffs must prove sales by participants in the alleged illegal activity and the amount of damages resulting therefrom. It is precisely these issues that determine the contribution liability among defendants.[49] Accordingly, assertion of contribution will not complicate an antitrust price-fixing case.[50]

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[49] Petitioners seek contribution in M.D.L. 310 based upon defendants' respective market shares. Such data has already been developed by plaintiffs (J.A. 43) and is therefore readily available. However, other methods of determining contribution shares may be appropriate in other antitrust cases. *See, e.g., Professional Beauty Supply, supra,* 594 F.2d at 1182, n.4.

[50] Of course, if this Court should effectuate contribution by claim reduction, it would have the additional salutary effect of simplifying antitrust cases because a plaintiff need only prove the liability of non-settling defendants and does not have to prove damages attributable to settling defendants.

Opponents of contribution argue that the availability of contribution should turn on whether or not a defendant is an intentional violator. From this it is argued that contribution would procedurally complicate antitrust cases because the issue of intent would be injected into the case. *See Wilson Abraham, supra,* 604 F.2d at 905-06; *Olson Farms, supra,* ¶ 61,698, at 79,704. But a rule of contribution should be available according to the same standard of intent as is applied to determine liability to a plaintiff in the first instance. Any effort to distinguish between intentional and unintentional violators ignores the basic fairness requiring contribution and is also inconsistent with the disgorgement and deterrence objectives.[51]

B. Contribution Will Not Present Procedural Manageability Problems

At common law, contribution could only be asserted after a party had been found liable to a plaintiff and had satisfied a judgment. W. Prosser, *Law of Torts* § 50, at 309 & n.80 (4th ed. 1971). Thus, contribution did not complicate a plaintiff's case. For example, in *Olson Farms, supra,* the party (Olson Farms) seeking contribution did not assert its claims against the other companies until after they had all been found in a prior action to have been participants in an unlawful price-fixing conspiracy and Olson Farms alone had satisfied the judgment.

Petitioners' assertion of cross-claims in M.D.L. 310 offered the advantage of consolidating the antitrust and contribution claims in a single proceeding. Fed. R. Civ. P. 13 permits a defendant to state a cross-claim "against a co-party arising out of the transaction or occurrence that is the subject matter . . . of the original action." Indeed, it was the purpose of this rule to permit the

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[51] *See* pages 15-20, 22-27, *supra.*

single adjudication of claims that might otherwise have resulted in separate actions. *Southern Construction Co.* v. *Pickard,* 371 U.S. 57, 60 (1962).

Petitioners did not seek to assert contribution against any party that was not already a defendant in M.D.L. 310. It is possible in other antitrust cases that contribution from a non-party will be appropriate, and Fed. R. Civ. P. 14 provides the mechanism for asserting third-party claims.[52] But even in such instances, the district court will have the discretion under Fed. R. Civ. P. 42(b) to order separate trials with respect thereto if it perceives a risk that the antitrust action will become too complicated.

Judicial management of contribution claims in antitrust cases as a substantive or procedural matter presents analogous issues to those found in securities cases. This similarity was noted by the Eighth Circuit in *Professional Beauty Supply,* which rejected asserted manageability problems in antitrust cases and stated: "We are aware of no unmanageable administrative problems which have been caused by allowing contribution in security cases." *Professional Beauty Supply, supra,* 594 F.2d at 1185.[53]

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[52] *See, e.g., Wilson Abraham, supra,* 604 F.2d at 899; *Professional Beauty Supply, supra,* 594 F.2d at 1180-81.

[53] In considering manageability problems, Judge Singleton speculated that contribution would inhibit joint defense activities. (J.A. 261) Such concern is unfounded. Defendants will always have the primary and common objective of refuting plaintiffs' allegations and will therefore work together. Even a defendant who hopes eventually to settle will join in such efforts because of the possibility that it will be unable to settle and will have to go to trial.

There is a particular irony in the district court's concern about joint defense efforts. Plaintiffs extracted cooperation agreements from settling defendants in which various defendants agreed to make documents available, waive the attorney-client privilege, assist plaintiffs' experts, or make witnesses available for trial. (*See, e.g.,* J.A. 59-60, 124-25) Clearly, provisions of this kind in settle-

Achievement of fairness in the allocation of damages through recognition of rights of contribution in antitrust cases presents no obstacles to the administration of justice. In any event, saving judicial resources does not warrant the injustices to antitrust defendants which result from prohibiting contribution.[54]

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ment agreements have a great potential to discourage joint defense efforts, yet the court expressed no concern about their impact on such efforts.

[54] As this Court noted in *Reliable Transfer, supra,* "[p]otential problems of proof in some cases hardly require adherence to an archaic and unfair rule in all cases." 421 U.S. at 407.

CONCLUSION

On the basis of the foregoing, petitioner Westvaco respectfully requests this Court to reverse the decision of the Court of Appeals for the Fifth Circuit and to remand to the district court with instructions to grant petitioner's rights of contribution in conjunction with claim reduction.

Dated: August 28, 1980

Respectfully submitted,

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Appendices

Appendix A

To the U. S. Senate Judiciary Committee—Subcommittee on the Constitution

Senators:

My name is George Kress of Green Bay, Wisconsin. Fifty-three years ago, at the age of 23, I started a company which is today known as Green Bay Packaging Inc. Our company manufactures corrugated boxes and from its beginning has been a family-owned and managed business. This business represents my family's entire assets—in other words—"all our eggs are in this one basket". I am appearing here today to explain to you how antitrust class actions threatened the entire loss of all the work my family and I have done in the past 53 years. My recent experience involving the current antitrust situation may help you to better understand the problems created for a small businessman in a capital-intensive industry.

Green Bay Packaging Inc. (Green Bay) has annual sales of 125 million dollars in an industry with total sales of 10 billion dollars annually. There are more than 1,000 companies in this particular industry, with the largest having approximately 6% of the total industry sales and Green Bay having 1.5% of these sales. While other much larger corporations in this industry have diversified into other related activities (accounting for their much greater net worth), Green Bay has grown almost entirely in this single business area and currently has a total net worth of approximately 70 million dollars. Green Bay employs 1780 persons in the states of Arkansas, Georgia, Ohio, Michigan, Wisconsin, Connecticut, Texas, Illinois, Mississippi and Oklahoma.

Two years ago, Green Bay and 38 others in the same industry received a request from a Federal Grand Jury

investigating antitrust price fixing conspiracy allegations. Our company responded by furnishing all requested information and witnesses to the Justice Department officials conducting the investigation, with no real concern, for Green Bay has had a long-standing policy of compliance with the antitrust laws and is in complete agreement with the premise that proper enforcement of these laws serves to protect our free enterprise system. At the conclusion of the Justice Department investigation, some of the other corporations and individual employees being investigated were indicted for felony or misdeameanor violations of the antitrust laws—8 corporate felony indictments, 5 corporate misdemeanor indictments, 17 individual misdemeanor indictments, 9 individual felony indictments —Green Bay was not indicted, and none of our employees were named as co-conspirators by the Justice Department attorneys conducting the criminal trial. This was fully within our expectations for we knew Green Bay was not guilty of any antitrust violations.

Less than one year following the Justice Department investigation, our company was named as a co-defendant in more than 25 class action suits, brought against all of the 39 corporations originally investigated by the Justice Department. Our management didn't feel overly concerned by these actions, for having been found not to be involved in the conspiracy alleged by the Justice Department, and finding none of its past customers named as a complaining plaintiff in the treble damage class action suits, we concluded that our only concern was to prepare to bear the expense of lengthy litigation to prove our innocence in the civil actions. Developments proved this to be a very erroneous conclusion.

Shortly after the filing of the many civil actions, and prior to the commencement of the criminal trial, some of the indicted defendants in the criminal suit settled the

civil actions with the plaintiffs by making payments to the plaintiffs' attorneys. This settling trend by the indicted defendants was then followed by many of the unindicted defendants entering into settlement agreements with the plaintiffs in the class actions. At this time, Green Bay conducted a detailed analysis of the situation and found as follows:

1. Approximately 80% of the defendants had entered into settlement agreements with the class plaintiffs;
2. The amount contributed by the settling plaintiffs at that time totaled over 100 million dollars.
3. Settlements were being arrived at by a formula decided upon solely by the plaintiff's lawyers, having as its base, the percentage share of the market, times a required dollar figure. Green Bay found that the dollar figure which had been offered to the first settling defendant, $500,000 per percentage point, had been steadily raised by the attorneys for each succeeding settling defendant, until the amount which was requested from our company for settlement was $3,700,000 per percentage point. Plaintiffs' attorneys settlement terms were clear and easily understood. The stated amount was required to settle at that moment—it would go up later and it was offered "take it or leave it."
4. Settlements in civil class action suits are encouraged by the Courts.

Green Bay now realized that it faced a monumental decision . . . pay the $5.5 million settlement, or face the financial risk that it may ultimately be the only remaining defendant who, under the law, could be jointly and severally liable for the entire amount of damages which may be allowed by a jury for the alleged price fixing conspiracy.

An estimate of the potential damages which might be decided by a Court was then necessary in order that a proper assessment of the situation was possible. Using a variety of assumptions, in order to arrive at a feasible damage figure which might ultimately be determined by a jury, a damage figure of 5% of the total industry annual sales was selected—subtracting settlements already made, and multiplying the results by 3 (because the law provided for treble damages in such cases), we concluded that we must stand ready to bear the burden of a potential legal liability of 5 billion dollars if we followed our original decision to defend our innocence of any civil antitrust liability. This, of course, would wipe out our entire equity and give our legitimate creditors from 1½¢ to 10¢ on their debt dollar. The attached statements are offered to illustrate the alternatives we faced. The choices available to Green Bay management became clear—and the extortion aspect of civil class action suits was indeed now understood. Our company was faced with the following choices:

1. Settle the pending class action suits by paying more than 5.5 million dollars to the plaintiffs' lawyers (and still face the liability of defending the individual antitrust civil suits which might be brought by plaintiff customers who do not wish to participate as members of the present class), *or*

2. Stand ready to continue to defend the class action suits and face the burdens of a contingent liability of over 5 billion dollars. This contingent liability would have to be reported to Green Bay's mortgage holders, and potential lenders, who would be very reluctant to even consider lending additional money to a corporation facing this severe liability. Our company's borrowing power was voided.

With this threat of insolvency hanging over our corporate heads, the owner-managers and outside directors of Green Bay reluctantly concluded a settlement agreement with the plaintiffs in the class actions. Loss of borrowing power is a killing factor for a small privately-owned corporation involved in a capital intensive manufacturing industry where a small business must borrow in order to compete. Attorneys who are instituting class action suits of this nature are well aware of the financial necessities of the defendant parties in such actions, thus their settlement policy, once a few parties are coerced into early settlement is to "up the ante" unless the remaining parties settle reasonably soon. It has been said that settlements ignore the due process aspect of our system of justice—this would certainly seem to illustrate that point. [Attached articles omitted.]

The above cited situation has been repeated many times in the settlement process of the civil class action suits now pending in the corrugated container industry. The effect of this extortive settlement practice upon a small, family-owned and managed business is catastrophic. We were threatened with the loss of over fifty years of effort, and coerced into paying an exorbitant settlement rather than being afforded the privilege of ultimately proving our corporate innocence.

Appendix B

IN RE CORRUGATED CONTAINER ANTITRUST LITIGATION

Settlements Through January 1979

Settling Defendants (Listed by categories in approx. order of Settlement)	*The % of Defendants' Market*	*Approximate Dollar Amount per % point of defendant's market share*	*Amount Paid In Settlement*
FELONY INDICTEES			
1. International Paper	8.3	$1.00 million	$ 8,300,000
2. Champion International Hoerner Waldorf	5.36	$4.50 million	$24,120,000
3. Weyerhaeuser	7.83	$5.00 million	$39,150,000
4. Owens-Illinois	5.45	$6.00 million	$32,700,000
5. Olinkraft	1.225	$6.00 million	$ 7,350,000
6. Continental Group	4.22	$6.50 million	$27,430,000
MISDEMEANOR INDICTEES			
1. Boise Cascade	2.826	$3.50 million	$ 9,891,000
2. Container Corp. of America	8.56	$4.00 million	$34,240,000
3. Inland Container	7.29	$4.75 million	$34,627,500
4. St. Joe Paper	2.625	$4.75 million	$12,468,750
5. Stone Container	3.055	$4.75 million	$14,511,250
UNINDICTED			
1. St. Regis Paper	3.97	$ .43 million	$ 1,700,000
2. Union Camp	3.70	$2.00 million	$ 7,400,000
3. Diamond International	.50	$2.00 million	$ 1,000,000
4. Dura-Containers	.375	$2.00 million	$ 750,000
5. Chesapeake	1.26	$2.40 million	$ 3,024,000
6. Longview Fibre	2.58	$2.50 million	$ 6,450,000
7. Willamette Industries/ Western Kraft East/ Corco	4.18	$2.70 million	$11,286,000
8. Menasha	1.67	$2.75 million	$ 4,592,250
9. MacMillan Bloedel MacMillan Bloedel Containers	2.11	$4.00 million	$ 8,440,000
10. U.S. Corrugated-Fibre Box	.767	$4.00 million	$ 3,069,120
11. Green Bay Packaging	1.71	$3.25 million	$ 5,557,500